

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PENOBSCOT INDIAN NATION,)	
)	
Plaintiff)	
v.)	Civ. No. 94-0212-B
)	
KEY BANK OF MAINE, ET AL.,)	
)	
Defendants)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiff and Counterclaim Defendant, Penobscot Indian Nation (“PIN”), brings this Motion in Limine against Defendants and Counterclaim Plaintiffs, John Palmer, Palmer Development Corporation, Palmer Management Corporation (collectively, the “Palmer Defendants”), and John Schiavi, to exclude all evidence at trial of presumed or punitive damages arising out of allegedly defamatory statements made by Plaintiff. In addition, Plaintiff contends that it is entitled to summary judgment on this issue because Defendants cannot establish actual damages. For the reasons set forth below, Plaintiff’s Motion In Limine is GRANTED, but the Court RESERVES judgment on the issue of actual damages.

I. BACKGROUND

The relevant facts of this case are set forth fully in this Court’s November 21, 1997, Order. In brief, Defendants brought counterclaims against Plaintiff for defamation arising out of statements made by Plaintiff at two press conferences held in September, 1994, at which Plaintiff announced the filing of a lawsuit against Defendants and other parties. Plaintiff contends that all evidence of presumed or punitive damages related to these statements should be excluded at trial because the statements involved a matter of public concern, and Defendants cannot establish that

Plaintiff made these statements with “actual malice.” Plaintiff further moves the Court for summary judgment on this issue, contending that if Defendants are prohibited from presenting evidence of presumed or punitive damages, they are left only with actual damages, which they are unable to establish. A hearing on this issue was held on December 1, 1997.

II. DISCUSSION

The First Amendment “forbids an award of presumed or punitive damages for words spoken without actual malice on matters of public concern.” Levinsky’s, Inc. v. Wal-Mart Stores, Inc., No. 97-1329, 1997 WL 586992, *9 (1st Cir. Sept. 26, 1997) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985)). Thus, if the allegedly defamatory statements related to a matter of public concern and Defendants are unable to establish that Plaintiff made these statements with “actual malice,” Defendants may only recover actual damages. “Although necessarily driven by [the] facts of a particular case,” a determination of whether the statements at issue addressed a matter of public concern is a question of law. Roe v. City of San Francisco, 109 F.3d 578, 584 (9th Cir. 1997).

As the First Circuit recently articulated in Levinsky’s,

The Supreme Court has roughly bisected the sphere of social commentary between matters of public concern, which are those that can be “fairly considered as relating to any matter of political, social, or other concern to the community,” and matters of private concern, which are those that address “matters of only personal interest.”

Levinsky’s, 1997 WL 586992, at *9 (quoting Connick v. Myers, 461 U.S. 138, 146-47 (1983)).

In order to determine whether a statement relates to a matter of public concern, a court must examine the statement’s “‘content, form, and context . . . as revealed by the whole record.’” Dun & Bradstreet, 472 U.S. at 761 (quoting Connick, 461 U.S. at 147-48). In conducting such an

examination, “the relevant community need not be very large and the relevant concern need not be of paramount importance or national scope.” Levinsky’s, 1997 WL 586992, at *9. Instead, “it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested.” Id. (quoting Roe, 109 F.3d at 585).

The Court is persuaded that under the broad standard set forth in Levinsky’s, the allegedly defamatory statements at issue do relate to a matter of public concern. Plaintiff is a sovereign Indian Nation that often operates and is treated as a municipality. When it suffers a large economic loss, as it did here, the loss is likely to be of concern to all of its members as well as others in the community.

Moreover, Plaintiff’s statements contained broad allegations against Defendants, including claims that Defendants participated “in a scheme to defraud” Plaintiff, and that the conduct of Defendants “resulted in the Penobscot Nation entering into an improvident and unconscionable partnership investment” under which Plaintiff “relinquished its right, its land, and its money to those who plundered the Penobscot Nation.” These allegations suggest a matter in which at least “a relatively small segment of the general public might be interested.” See id. Also persuasive to the Court’s decision is the fact that the allegedly fraudulent conduct involved several prominent businessmen in the state and a prominent state financial institution. See Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 686 (4th Cir. 1989) (summarily deciding that the statements at issue involved a matter of public concern “[b]ecause of the obvious importance of banks to the financial health of our communities and the historic governmental interest in the operations and solvency of these institutions”).

Finally, while the Levinsky’s court noted that “[t]he primary focus of the relevant

constitutional inquiry must remain on the speech's content and the public's perception of the topic," the court also recognized that the subjective intent of the speaker in making the statements may also be relevant to a public concern analysis. Levinsky's, 1997 WL 586992, at *10. The fact that Plaintiff read the allegedly defamatory statements at two press conferences and distributed the text of these statements to the media suggests that its intent was to inform at least some segment of the general community of an alleged scheme to defraud the Indian Nation. The Court recognizes that Defendants did nothing to generate any public discourse about the dispute and that Plaintiff should not, solely by its own conduct, be able to create its own defense. See id. at 10. The Court views Plaintiff's intent as only one of several relevant factors which, together, establish that Plaintiff's statements related to a matter of public concern.

Since the Court finds that the allegedly defamatory statements involved a matter of public concern, the Court next turns to the issue of whether Defendants can establish that Plaintiff made these statements with "actual malice." Actual malice is defined as either knowledge that the statement was false, or reckless disregard as to the statement's falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Defendants must be able to establish with convincing clarity that Plaintiff knew the statements were false or "entertained serious doubts as to the truth of [the] publication." Michaud v. Inhabitants of Livermore Falls, 381 A.2d 1110, 1114 (Me. 1978) (quoting St. Amant v. Thompson, 390 U.S. 727, 730 (1968)). The inquiry focuses on Plaintiff's subjective state of mind. Id. at 1113-14.

The Court is persuaded on the basis of the record before it that Defendants cannot establish with convincing clarity that Plaintiff acted with "actual malice" when it made the statements at the press conferences. Indeed, the nature of the proceedings at which the

statements were made suggests otherwise. Plaintiff made the statements in connection with a lawsuit it simultaneously filed against Defendants and other parties. The Court acknowledges the possibility that Plaintiff's statements were exaggerated or that Plaintiff could have been more diligent in determining the veracity of the statements; however, these considerations do not constitute clear and convincing evidence that Plaintiff knew its statements were false or acted in reckless disregard as to their falsity. Rather, the evidence suggests that overall, Plaintiff in good faith believed that the statements were true.

Given that the Court finds that the allegedly defamatory statements involved a matter of public concern and the evidence does not support a finding that Plaintiff acted with "actual malice," Defendants are only entitled to actual damages, not presumed or punitive damages. Consequently, the Court will exclude all evidence of presumed or punitive damages at trial. In light of Defendants' contentions that they will present evidence of actual damages at trial, however, the Court reserves decision on the issue of actual damages.¹

For the reasons discussed above, Plaintiff's Motion In Limine is GRANTED. The Court RESERVES judgment on the issue of actual damages.

SQ ORDERED.

MORTON A. BRODY
United States District Judge

Dated this 4th day of December, 1997.

¹ As indicated by the Palmer Defendants at the December 1, 1997, hearing, since Defendant Palmer Management Corporation cannot establish any actual damages, it is no longer a party to this case.